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No. 06-40

In the Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE *AMICUS BRIEF* And BRIEF OF THE THOMAS MORE LAW CENTER, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PATRICK GILLEN
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

Counsel for Amicus Curiae

Becker Gallagher Legal Publishing, Inc. 800.890.5001

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *Amicus Curiae* Thomas More Law Center states that it is a not-for-profit corporation, does not have any parent corporation, and no public corporation owns ten percent or more of its stock.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Thomas More Law Center respectfully requests that this Court grant it leave to file the attached brief in support of the petitioner in the above-captioned case. Pursuant to Rule 37(2)(b), counsel understands that the petitioner has given its consent to the filing of briefs by *amicus* and has a filed a letter with the court attesting to that consent. Counsel for the respondent declined to give an unqualified consent to the filing of this *amicus* brief.

The Thomas More Law Center ("TMLC") is a national, public interest law firm dedicated to defending and promoting the sanctity of human life, religious liberty, and time-honored family values, as seen in light of the Roman Catholic tradition. It engages in public interest litigation, public education, and related activities pursuant to those goals.

The TMLC has an interest in this case because a governmental body has used the force of law to stifle a fundamental right guaranteed by the First Amendment. In this regard, the TMLC notes that this case illustrates increasingly common efforts to compel compliance with the prevailing orthodoxy of political correctness by force of law that threaten to eviscerate the fundamental rights to free speech and expressive association as well as the free exercise of religion. The TMLC has counseled Catholic Charities of Maine ("CCM") and has dealt first-hand with a reprehensible effort by the City of Portland, Maine, to require CCM to recognize same-sex "domestic partnerships" as a condition of eligibility for government grants. The TMLC notes that the City of Portland imposed that condition with reckless disregard for CCM's sincerely held religious conviction that material cooperation with such conduct is directly contrary to

the teaching of the Roman Catholic Church concerning the natural family and its essential role in promoting the welfare of spouses, children, and the common good. *See Catholic Charities of Maine, Inc. v. City of Portland*, 304 F.Supp.2d 77 (D. Me. 2004).

The TMLC has also observed with concern the use of civil law to compel organizations with a Christian inspiration, affiliation, and mission, to engage in conduct directly contrary to faith and morals as seen in light of the Roman Catholic faith. The TMLC has watched in dismay as the Supreme Court of the State of California has approved the use of civil law to require institutions affiliated with the Roman Catholic Church to provide contraceptives although the Roman Catholic Church teaches that the use of artificial means to thwart the procreative power given to man by God is gravely wrong. *See Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento*, 32 Cal.4th 527 (2004), *cert. denied*, 543 U.S. 816 (2004).

The TMLC sees in this case another odious use of civil law to compel an organization which engages in expressive association to oppose the homosexual lifestyle and atheism to include individuals who espouse contrary views as a condition of eligibility for a government benefit. The TMLC believes this indirect effort to force the Sea Scouts to admit individuals whose views on atheism or the homosexual lifestyle are directly contrary to those which the Sea Scouts advance by means of expressive association is the epitome of an unconstitutional condition. The TMLC further believes that such a policy, if countenanced by this Supreme Court, will establish a dangerous precedent that will be used to further undermine the fundamental rights of free speech, expressive association, and the free exercise of religion. For this reason the TMLC respectfully requests leave of this honorable Court

to file the attached brief in order to assist this Court in a proper resolution of this case.

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INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus* is fully stated in its motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

This *amicus* adopts the Statement of the Case as presented by Petitioner.

ISSUE PRESENTED FOR REVIEW

I. Given that the City of Berkeley cannot apply its nondiscrimination ordinance directly to the Sea Scouts in order to force the Sea Scouts to include individuals who support the homosexual lifestyle or atheism in light of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), can Berkeley enforce that ordinance indirectly by making forced inclusion a condition of eligibility for a government benefit?

SUMMARY OF THE ARGUMENT

As this Supreme Court has long held, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). "[T]his principle, known as the unconstitutional conditions doctrine," *see Rumsfeld v. Forum*

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

For Academic & Institutional Rights, Inc., __ U.S. __, 126 S.Ct. 1297, 1307 (2006), has a simple yet compelling rationale: "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited.... Such interference with constitutional rights is impermissible." *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 717 (1996). Indeed, if government could condition eligibility for benefits upon the forfeiture of constitutional rights, then the very governmental powers granted by the people, and for the people, could be used to make the people subservient to government.

The Sea Scouts' petition arises from just such an abuse of government power by the City of Berkeley. As the California Supreme Court acknowledged, Berkeley deprived the Sea Scouts of free berths made available to nonprofits "due to [BAS's] discriminatory policies against gays and atheists." *Evans v. City of Berkeley*, 38 Cal. 4th 1, 9 (2006). In essence, Berkeley, which cannot apply its nondiscrimination ordinance against the Sea Scouts directly because of this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), applied that nondiscrimination ordinance indirectly–by making compliance with the ordinance a condition for a government benefit–the free access to marina berths given to nonprofit organizations. In doing so, Berkeley violated the principle that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan*, 497 U.S. at 77-78.

The court below approved the unconstitutional condition Berkeley placed upon access to public facilities based on facile characterization and a superficial view of this Supreme Court's controlling precedent. Labeling equal access to

public facilities for the purpose of private expressive activity a "subsidy," the court below concluded that Berkeley could condition this benefit on the very kind of forced inclusion that would vitiate the Sea Scouts' expressive association. Labeling the application of the nondiscrimination ordinance "content-neutral," the court below eschewed any meaningful scrutiny of Berkeley's effort to make the Sea Scouts accept members whose views directly contradict those to which the Sea Scouts are committed.

This Supreme Court's controlling precedent make both of these mischaracterizations-and the decision which they undergird-wholly insupportable. This Court has never regarded equal access to public facilities for the purpose of private expressive activity as a "subsidy." Quite the contrary, it has repeatedly recognized that equal access is more realistically characterized as a government benefit that cannot be denied based on activity protected by the First Amendment. *See, e.g., Healy v. James*, 408 U.S. 169 (1972). Likewise, this Court has never condoned violations of the right to expressive association merely because the violation results from the application of laws that do not target viewpoint on their face. If that were the case, then *Dale*, would have been decided differently-but it was not. From this it follows that unconstitutional conditions cannot be excused on the ground that Berkeley's nondiscrimination ordinance is content-neutral on its face.

More fundamentally, this Court's decision in *Dale* wholly undermines the pretense, endorsed by the court below, that Berkeley's policy is viewpoint neutral. Quite the contrary, *Dale* recognizes that the forced inclusion of members whose views contradict views a group seeks to advance through expressive association is tantamount to forcing a group to advance views it does not accept. The necessary corollary

required by this Court's unconstitutional conditions doctrine is that denying government benefits based on a group's refusal to admit individuals whose views contradict those which the groups seeks to advance through expressive association is tantamount to viewpoint discrimination.

The Thomas More Law Center respectfully requests that this Court grant the Sea Scouts' petition for a *writ of certiorari* and strike down the unconstitutional condition Berkeley has placed on the Sea Scouts' eligibility for the benefit that Berkeley extends to nonprofit organizations. This Court's decision in *Dale*, prevents Berkeley from using its nondiscrimination ordinance to make the Sea Scouts admit members whose views contradict the values to which the Sea Scouts are committed. This Court should take this opportunity to make plain the logical corrollary required by this Court's unconstitutional conditions doctrine: just as Berkeley cannot directly force the Sea Scouts to include individuals whose views contradict the Sea Scouts' opposition to the homosexual lifestyle and atheism, Berkeley cannot do so indirectly by requiring the Sea Scouts to associate with individuals who espouse those views as a condition of eligibility for a government benefit because "[s]uch interference with constitutional rights is impermissible." *O'Hare Truck Service*, 518 U.S. at 717.

ARGUMENT

The question presented by this case is simply stated: Given that Berkeley cannot apply its nondiscrimination ordinance directly to the Sea Scouts in order to force the Sea Scouts to include individuals who support the homosexual lifestyle or atheism in light of *Dale*, *supra*, can Berkeley enforce that ordinance indirectly by making forced inclusion a condition of eligibility for a government benefit? The

Thomas More Law Center respectfully submits that the answer to that question is quite clearly: No. A long line of this Supreme Court's precedents hold that government cannot condition eligibility for benefits on forfeiture of fundamental rights. Notwithstanding this doctrine, Berkeley seeks to secure just such a forfeiture by forcing the Sea Scouts to admit members whose views contradict their opposition to the homosexual lifestyle and atheism in order to qualify for free access to marina berths. Given the uncontrovertible fact that the Sea Scouts are committed to expressive association with the Boy Scouts of America, and the opposition to the homosexual lifestyle and atheism which this Court acknowledged in *Dale*, there is no doubt that Berkeley's decision to deprive the Sea Scouts of free berths made available to nonprofits "due to [BSA's] discriminatory policies against gays and atheists," *see Evans*, 38 Cal. 4th at 9, violates this Court's unconstitutional conditions doctrine.

The court below approved a result directly at odds with this Court's unconstitutional conditions doctrine because it elevated form above substance. The court below focused on form, not substance, despite this Court's recognition that it is "not free to disregard practical realities" when addressing restrictions placed on fundamental rights because those rights "are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference. *Healy*, 408 U.S. at 183. For this reason, this Court has consistently avoided "[d]etermining constitutional claims on the basis of...formal distinctions, which can be manipulated largely at the will of the government agencies concerned...." *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 679-80 (1996)(holding that eligibility for government contracts cannot be conditioned on political fealty and citing cases for the proposition that the law must focus on substance not form).

The opinion below must be reversed precisely because it fails to realistically characterize the practical realities of this dispute and rests upon a misapplication of this Court's controlling precedent. For one thing, the court below characterized access to public facilities for the purpose of private expressive activity as a "subsidy." But it is unrealistic–and inconsistent with this Supreme Court's decisions–to characterize access to public facilities for the purpose of private expressive activity as a "subsidy." This Court has always characterized access to public facilities for the purpose of private expressive activity realistically as a government benefit. From this it follows that Berkeley's policy is an effort to condition eligibility for a government benefit on the very sort of forced inclusion that violates the Sea Scouts' right to expressive association–not a "subsidy" in any meaningful sense.

The court below also held that Berkeley's effort to condition eligibility for a government benefit did not violate the First Amendment because the condition was imposed by means of a law that did not target expressive activity on its face. But it is wholly mistaken to suppose that restrictions on expressive association are insulated from the requirements of the First Amendment merely because the restrictions are imposed by means of a law which, on its face, regulates conduct not expression. If that were the case, then *Dale*, would have been decided differently. From this it follows that Berkeley's unconstitutional condition cannot be excused on the grounds that its policy turns on conduct not speech.

In a related error the court below held that Berkeley's effort to require the Sea Scouts to include those whose views disagree with the views to which the Sea Scouts are committed did not constitute viewpoint discrimination because the condition was imposed by means of a law that did not

target expressive activity on its face. But it is wholly untenable to assert that conditioning eligibility for a government benefit on the forced inclusion of members whose views contradict those the Sea Scouts seek to advance through expressive association does not violate the Sea Scouts' right to expressive association. Again, if this were the law, then *Dale*, *supra*, would have been decided differently–but it was not. From this it follows that Berkeley's policy, which denies a benefit to the Sea Scouts because they will not agree to include individuals who hold views contradicting those of the Sea Scouts must be seen for what it is: viewpoint discrimination in the allocation of government benefits.

In sum, the decision below must be reversed because it is plainly wrong to hold that Berkeley, which cannot enforce its nondiscrimination ordinance against the Sea Scouts directly, can enforce that ordinance indirectly by making compliance with that ordinance a condition of eligibility for a government benefit. As demonstrated below, Berkeley cannot condition eligibility for free berths on the forced inclusion of those whose views contradict the views that the Sea Scouts advance through expressive association because it has not shown the compelling interest required to override First Amendment rights. As a result, the condition that Berkeley has placed upon the benefit is an unconstitutional condition. Therefore, Berkeley's policy must be struck down.

I. Equal Access to Public Facilities Is A Benefit Not A Subsidy.

The opinion below rests upon this premise: "under the decisions of the United States Supreme Court, that Berkeley's nondiscrimination requirement applied only to programs assisted by a city subsidy, in the form of free berths at the marina, is virtually dispositive." *Evans*, 38 Cal. 4th at 11.

The court below viewed its characterization of free access to a marina berth as a "subsidy" to be "virtually dispositive" because this led it to ignore the principle "that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons....[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in freedom of speech." *Rutan*, 497 U.S. at 72. Attention to this first question reveals one error underlying the decision below and goes a long way toward explaining how the court below managed to approve the very result forbidden by this Court's unconstitutional conditions precedent.

It is true that characterization of free access to the marina as a "subsidy" is "virtually dispositive," *Evans*, 38 Cal. 4th at 11, but the disposition required by that (mis)characterization is reversal. For although the court below viewed access to public facilities as a "subsidy," this Court has always viewed access to public facilities for the purpose of private expressive activity as a government benefit. For example, in *Healy*, *supra*, this Court observed that "the primary impediment to free association flowing from nonrecognition...[was] the denial of use of campus facilities for meetings and other appropriate purposes," *Healy*, 408 U.S. at 181, and it has also recognized that *Healy*, stands for the proposition that it is unconstitutional to "impose penalties or withhold benefits based on membership in a disfavored group," *FAIR*, 126 S.Ct. at 1312 (underline added). Similarly, in *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998), this Court noted the distinction between decisions to grant funds for art projects and "the subsidy at issue in *Rosenberger*," as well as "decisions on allocating public benefits such as access to a school auditorium or a municipal theater." *Id.* at 586 (*citing Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches*

Union Free School Dist., 508 U.S. 384 (1993), *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1993)(underline added). Likewise, in *Board of County Commissioners, Wabaunsee County, Ka. v. Umbehr*, 518 U.S. 668 (1996), after noting that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech," *id.* at 675, this Court listed its cases dealing with "users of public facilities and recipients of small government subsidies...." *Id.* at 680 (*citing Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), *Healy v. James*, 408 U.S. 169 (1972)(access to campus facilities for student meetings and activities); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984)(government subsidy for private speech).

The point here is that this Court has understood its decisions dealing with access to public facilities to concern eligibility for a public benefit (not a subsidy) and it has consistently distinguished this benefit from subsidies. This Court does not treat equal access to public facilities as a subsidy because it is not realistic to do so. Granting similarly situated citizens equal access to public facilities for the purpose of private expressive activity is a benefit; it is not a "subsidy" in any meaningful sense–any more than equal access to public parks or public roads is a subsidy.

The characterization of access to public facilities as a "subsidy" adopted by the court below rings hollow for another reason: the facts belie it. Berkeley does not provide a subsidy to nonprofit organizations when it waives the fee for access to marina berths. The real issue here is whether Berkeley can force the Sea Scouts to pay private (not public) funds for access to public facilities–and why some citizens are forced to pay while others are not. In a very real sense,

Berkeley has decided to make the Sea Scouts pay for their decision to exercise their right to expressive association.

For this simple reason, the reliance that the court below placed on cases providing for actual (not fictional) funding or subsidies is wholly misplaced. *See Evans*, 38 Cal. 4th at 11-15. Each of those cases can be fairly characterized as involving a subsidy because they involved a payment of public funds or a tax exemption. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991)(federal funds for counseling that delivers government message to patients); *United States v. American Library Assn, Inc.*, 539 U.S. 194 (2003)(federal funds for internet capability); *Locke v. Davey*, 540 U.S. 712 (2004)(state funds for Promise Scholarship); *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998)(grants to qualifying artists for art consistent with public purpose). In contrast, the real issue here is Berkeley's decision to charge the Sea Scouts for the same access granted to others at no charge because the Sea Scouts have refused to forfeit their right to expressive association.

Recognition that equal access to public facilities is a benefit (not a subsidy) demonstrates that the cases relied upon by the Sea Scouts provide the better guide to the proper resolution of this case. And, as the Sea Scouts point out, those cases make it very clear that Berkeley cannot condition eligibility for government benefits on forfeiture of First Amendment rights. As explained below, Berkeley cannot excuse the unconstitutional condition it has placed on eligibility for free access to marina berths on the thin pretext that its nondiscrimination policy focuses on conduct not expression.

II. Denying Government Benefits Due To A Refusal To Admit Members Whose Views Differ From Those A Group Advances Through Expressive Association Is Viewpoint Discrimination Barred By The First Amendment.

The court below approved Berkeley's effort to force the Sea Scouts to include those whose views contradict the opposition to atheism and the homosexual lifestyle which the Sea Scouts further through their expressive association on the grounds that Berkeley's condition turned on conduct and, for this reason, did not penalize the Sea Scouts for their viewpoint on these issues. *Evans*, 38 Cal. 4th at 13-14. This is the second fundamental error underlying the decision below because, as this Court has recognized, insofar as expressive association is concerned, the conduct (association) is the content and "public...disapproval of a tenet of an organization does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organizations expressive message." *Dale*, 530 U.S. at 661. Respect for this holding, itself grounded in a laudable realism well calculated to protect the fundamental right to expressive association, compels the conclusion that Berkeley's effort to condition the Sea Scouts' eligibility on the forced inclusion of members whose views contradict those of the Sea Scouts is an unconstitutional condition tantamount to viewpoint discrimination.

The notion that Berkeley's condition on eligibility for a free berth does not violate the Sea Scouts' expressive association because the condition focuses on conduct, not viewpoint, must be rejected. This Court has never exempted regulations abridging First Amendment rights from searching review based on the facile argument that the regulations restrict conduct not content. Thus in *Healy*, *supra*, this Court

held that student groups could not be denied access to campus facilities and benefits based upon their association with groups that had engaged in unlawful conduct even though the stated grounds for denying access to the college campus was a prohibition of unlawful *conduct* that did not, on its face, target expression. Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that Massachusetts' public accommodation law could not be used to force inclusion of a contingent committed to the homosexual lifestyle even thought the law, on its face, prohibited conduct (*i.e.*, discrimination) not expression. And in *Dale*, *supra*, this Court held that New Jersey's public accommodations law could not be used to force inclusion of homosexuals into the BSA even though the law, on its face, restricted conduct not expression.

In none of these cases did this Court accept the superficial claim that the restriction on expressive association was insulated from meaningful review under the First Amendment because the regulation was a content-neutral regulation of conduct not expression. Quite the contrary, this Court made a realistic appraisal of the situation and found that the conduct at issue was entitled to protection under the First Amendment precisely because the law was applied to expressive conduct. The reality captured by this Court's expressive association precedents is both plain and simply stated: insofar as expressive association is concerned, the conduct is the content and–by its very nature–necessarily reflects the viewpoint of its adherents. Consequently, denying government benefits to persons because of their expressive association is, by its very nature, viewpoint discrimination.

It is true, of course, that Berkeley's application of its nondiscrimination ordinance against the Sea Scouts is indirect because it is a condition of eligibility for a government

benefit. But this does not mean that Berkeley's policy can be insulated from meaningful review under the First Amendment on the thin pretext that the condition turns on conduct not expression for the same reason that this argument has no force where restrictions are direct. Rather, the fact that Berkeley seeks to do indirectly what it cannot do directly simply means that Berkeley's policy is analyzed under this Court's unconstitutional conditions doctrine. If the unconstitutional condition cases mean anything, they mean that government has no legitimate power to condition eligibility for government benefits on silence or expression consistent with government orthodoxy.

Seen in this light, it is evident that Berkeley's effort to condition eligibility for benefits on conduct that effectively makes the Sea Scouts renounce their view on homosexuality and atheism effectively requires the Sea Scouts to forfeit their right to expressive association in exchange for a government benefit which, for this reason, amounts to an unconstitutional condition. In essence, Berkeley demands conduct that contradicts the message conveyed by the Sea Scouts through their expressive association and, in this way, would make the Sea Scout's speak Berkeley's message concerning the homosexual lifestyle and atheism. As this Court recognized in *Dale*, *supra*, such forced association is tantamount to censorship or compelled speech. *See Dale*, 530 U.S. at 656 (recognizing that forced inclusion of homosexual would "significantly affect" expression). As this Court took pains to point out in *Dale*, such forced inclusion is barred by the First Amendment precisely because "public...disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Dale*, 530 U.S. at 661. And from this it follows that discrimination against a group

because of conduct pursued to promote the views of an organization is tantamount to viewpoint discrimination. *See, e.g., Healy*, 408 U.S. at 187-88 (noting that "The College...may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

Taken together, these cases demonstrate that the decision below must be reversed because it is critically flawed and wholly at odds with this Court's controlling precedent. The court below failed to see that Berkeley's policy relates to a government benefit not a subsidy.[2] And the court below failed to see that Berkeley's policy requires a forced inclusion at odds with the Sea Scouts' viewpoint and, as a result, conditions eligibility for a government benefit on the Sea Scouts' forfeiture of their right to express their views on these issues by means of expressive association. As explained

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[2] Indeed, even if the free berth that Berkeley makes available to nonprofits performing public service were properly classified as a "subsidy" within the meaning of this Court's precedent, Berkeley's effort to force the Sea Scouts to alter–in effect repudiate–the views conveyed by their expressive association would nonetheless represent an unconstitutional condition. As explained *infra*, Berkeley's decision to deny the subsidy because the Sea Scouts refuse to include individuals whose views contradict the views that the Sea Scouts seek to advance through expressive association constitutes illicit viewpoint discrimination. This Court has never allowed government subsidies to be conditioned on viewpoint discrimination. *See*, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)(First Amendment barred government from viewpoint discrimination in funding of private speech); *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001)(government funding of legal counsel to represent indigent was funding of private speech which could not be restricted to bar arguments challenging existing law).

infra, the court below misread (and misapplied) this Court's precedent on its way toward reaching a conclusion that flies in the face of the fundamental principle animating this Court's unconstitutional conditions analysis, *i.e.*, "what the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan*, 497 U.S. at 77-78.

III. The Court Below Misread And Misapplied Controlling Precedents.

Because the court below focused on form, not substance, it misread and misapplied controlling precedent. Its reliance on *Bob Jones University* and *Grove City College* is wholly mistaken for the simple reason that in each of these cases the condition on eligibility for government benefits was based upon a compelling state interest. *See Evans*, 38 Cal. 4th at 12-13 & n. 6. The court below misread this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), because it failed to appreciate that eradicating racial discrimination was seen as a compelling interest that the government could advance directly. As a result, enforcing this interest indirectly, by conditioning eligibility for a tax exemption upon nondiscrimination, was not an unconstitutional condition.

Similarly, *Grove City College v. Bell*, 465 U.S. 555 (1984), arose from efforts to eradicate sex discrimination indirectly *via* conditions for participation in federal financial aid programs. Here again, the effort to eradicate sex discrimination indirectly, as a condition for a government benefit, was not an unconstitutional condition because, as this Court recognized in *Dale*, *supra*, eliminating sex discrimination is a compelling state interest. *See Dale*, 530 U.S. at 657 ("We recognized in cases such as *Roberts* and

Duarte that States have a compelling interest in eliminating discrimination against women in public accommodations). Indeed, long before *Grove City College* was decided this Court had upheld government regulations outlawing speech in furtherance of sex discrimination, despite a First Amendment challenge, precisely because it was speech in furtherance of conduct which the City of Pittsburgh had made unlawful consistent with the First Amendment. *See Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations*, 413 U.S. 376 (1973)(human relations ordinance which prohibited newspaper from carrying sex designated advertising columns did not violate newspaper publishers First Amendment rights because discrimination in employment is illegal commercial activity).

In short, neither of these cases involved unconstitutional conditions precisely because each concerned a compelling state interest that the government could command directly and, as a result, there was no question that government could further that objective indirectly by making compliance a condition of eligibility for a government benefit. *Cf. FAIR*, 126 S.Ct. at 1307 (Solomon Amendment conditioning eligibility for federal funds on providing equal access to military recruiters was not an unconstitutional condition because Congress could require equal access pursuant to its power to raise and support armies and provide and maintain a navy.).

The opposite is true here: because the First Amendment prevents Berkeley from imposing its nondiscrimination ordinance directly, Berkeley cannot enforce its policy indirectly as a condition of elibility for benefits. Accordingly, Berkeley's policy does place an unconstitutional condition on the receipt of a government benefit.

In a similar way the court below failed to appreciate the true thrust of this Court's decision in *Healy*, *supra*. *See Evans*, 38 Cal. 4th at 19-20. There is no question that government could punish disruptive or violent conduct because, as this Court took pains to point out in *Healy*, violent or disruptive conduct is not protected by the First Amendment. *See Healy*, 408 U.S. at 192-94 (noting that exclusion from campus would be justified if supported by evidence of unlawful conduct). But the whole point of *Healy* is that students could not be denied benefits based on the exercise of their protected right to associate with others–even if those others had engaged in unlawful activity. *Id.* at 194.

This case, in contrast, involves the Sea Scouts' exercise of their First Amendment right of association. Nothing in *Healy* supports the principle that expressive conduct protected by the First Amendment can be punished on the pretext that the purpose of the restriction is to regulate unlawful conduct. If that were the law, then *Healy* would have been decided differently. Instead, *Healy* requires the state to ensure that its regulation punishes only the unlawful conduct–not the lawful conduct protected by the First Amendment. The court below failed to recognize this distinction and, as a result, read *Healy* as if it allowed Berkeley to punish conduct protected by the First Amendment simply because Berkeley choose to make that conduct unlawful. That reading of *Healy* is absurd–and utterly at odds with the cases cited earlier in which this Court has rejected efforts to restrict the right to associate by means of laws prohibiting conduct protected by the First Amendment.

CONCLUSION

Amicus curiae Thomas More Law Center respectfully requests that this Court grant the Sea Scouts' petition for a *writ of certiorari* and strike down the unconstitutional condition Berkeley has placed on the Sea Scouts' eligibility for the benefit Berkeley extends to nonprofit organizations. This Court has long acknowledged that "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited." *O'Hare Truck Service*, 518 U.S. at 717. For this very reason, Berkeley cannot force the Sea Scouts to include individuals whose views contradict the Sea Scouts' opposition to the homosexual lifestyle and atheism as a condition of eligibility for a government benefit. As this Court has ruled in other cases, "[s]uch interference with constitutional rights is impermissible." *Id.*

Respectfully Submitted,

Patrick Gillen
Counsel of Record
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001